92-1026

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No._____

In the Supreme Court of the United States

October Term, 1992

CITY OF LONG BEACH, et al.,

Petitioners,

vs.

LARRY GEORGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a plaintiff who is awarded zero actual or nominal damages from a jury for a technical violation of his constitutional rights after initially seeking a large damage award, a "prevailing party" within the meaning of 42 U.S.C. §1988 and this court's decisions in *Hewitt v. Helms* 482 U.S. 744 (1982), *Rhodes v. Stewart* 488 U.S. 1(1988), and *Texas State Teachers Assn. v. Garland* 489 U.S. 782 (1989) when the Appellate Court orders an award of one dollar in nominal damages?

2. When a plaintiff proves a technical violation of his constitutional rights, are nominal damages permissive or mandatory?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, City of Long Beach, Robert Fowks, and Harry Kartinen, and the respondent, Larry George.

The parties before this court are the same.

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October Term, 1992

CITY OF LONG BEACH, et al.,

Petitioners,

vs.

LARRY GEORGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, City of Long Beach, Robert Fowks and Harry Kartinen, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 17, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit *George v. City of Long Beach*, 973 F.2d 706 (9th Cir. 1992), is reprinted in Appendix A, *infra*. This opinion was published pursuant to an order of the Ninth Circuit dated 9-17-92, amending and superseding the Court's opinion in *George v. City of Long Beach*, Nos. 91-55082, 91-55382 (9th Cir. July 31, 1992), ____F.2d ____ (9th Cir. (Cal.)), which is reprinted in Appendix B, *infra*.

The order of the United States District Court for the Central District of California (King, G.H.) dated September 12, 1990, from which the above appeal was taken, was not reported. It is represented in Appendix C., *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the Respondents brought this suit in the Central District of California on April 9, 1987. a jury returned its special verdict in favor of Petitioners with a finding that Respondent suffered neither actual nor nominal damages from Petitioners' warrantless entry into Respondent's residence. The District Court thereafter entered judgment in favor of Petitioner. Appendix C, *infra*.

Following an appeal regarding the propriety of the jury awarding zero nominal damages on July 31, 1992, the Ninth Circuit vacated the judgment and remanded for entry of an award of one dollar in nominal damages and judgment in favor of Respondent with a finding that Respondent is entitled to attorney's fees as the "prevailing party". Appendix B , *infra*.

A petition for rehearing was timely filed by Petitioners. In an order dated July 17, 1992, the Ninth Circuit amended the July 31, 1992 opinion and denied the Petition for Rehearing. Appendix A, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1988(b). *Attorney's Fees.*

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1983. *Civil Action for Deprivation of Rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Petitioners Robert Fowks and Harry Kartinen are Police Officers for the City of Long Beach. On December 24, 1986 at approximately 1:00 p.m. Officer Harry Kartinen participated in an investigation of an armed robbery that occurred at a Security Pacific National Bank in the City of Long Beach. Shortly thereafter, Officer Kartinen was advised by an F.B.I. agent that a probable suspect to the robbery was Respondent, and the F.B.I. agent requested that Officer Kartinen place the Respondent's residence in the City of Long Beach under surveillance.

Less than an hour later, Officer Kartinen spoke again with the F.B.I agent and was informed that the same suspect who had robbed the Security Pacific National Bank in Long Beach had just robbed the Bank of America branch in the City of Stanton shooting an unarmed security guard. Officer Kartinen was further advised by the F.B.I. agent that Respondent had robbed another bank in Orange County a few days prior and had been identified from a bank photograph by Respondent's parole officer as the perpetrator of that crime.

Officer Kartinen then proceeded to Respondent's residence where he joined forces with Officer Fowks to conduct surveillance of Respondent's residence. While waiting there, Officer Kartinen received a radio message to contact the F.B.I. agent. Officers Kartinen and Fowks then left the area to find a telephone. During the conversation with the F.B.I. agent, Officer Kartinen was told that witnesses at the Bank of America in the City of Stanton had positively identified Respondent as the perpetrator of the robbery.

When officers Kartinen and Fowks returned to Respondent's residence, they noticed that Respondent's car was parked out front with the engine still warm and with water dripping from the air conditioning unit. Officers Kartinen and Fowks further observed that the door to Respondent's residence was now open.

Officers knew the respondent was armed and dangerous, as he had brandished a gun in both robberies and had shot an unarmed security guard less than an hour earlier. The officers felt that it would be prudent for everyone's safety to take respondent immediately into custody, and Officers Fowks and Kartinen, dressed in police uniform, entered Respondent's residence through the open front door. Officers Fowks and Kartinen saw Respondent in his bedroom and told him to "hold it". When Respondent moved, Officer Kartinen believing Respondent was holding a gun, fired his shotgun. Respondent was struck in the arm, and his arm was ultimately amputated.

Respondent was arrested, tried and convicted of the aforementioned robberies. Respondent is currently serving a lengthy prison sentence in a Federal penitentiary.[1]

Invoking federal jurisdiction under 42 U.S.C §1983, the Respondent brought this suit in the Central District of California on April 9, 1987. The suit initially alleged that Long Beach Police Officers, as well as the City of Long Beach, violated Respondents' Fourth Amendment rights by (1) not obtaining a search warrant before entering

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[1]See *United States v. George* 883 F.2d 1407 (9th Cir. 1989) where the Ninth Circuit Court of Appeals affirmed Respondent's conviction but found the officer's warrantless entry into Respondent's residence was not justified by exigent circumstances.

Respondent's residence; (2) by failing to comply with the knock notice requirements of *California Penal Code* §844; (3) by using excessive force in the course of the arrest of Respondent. The suit also alleged pendent state claims of false arrest, false imprisonment and battery. Respondent sought general and punitive damages, plus costs and fees.

On August 29, 1990 a partial summary judgment motion was granted, and the trial court, agreeing with the Ninth Circuit Court of Appeals' decision in Respondent's criminal case *United States v. George* 883 F.2d 1407 (9th Cir. 1989), found that Respondent's Fourth Amendment rights were violated when the officer entered his residence without a warrant to arrest. The trial court further found, that the officers had no good faith defense to the unlawful entry.

This matter proceeded to trial before a jury on September 4, 1990. On September 10, 1990 the jury returned its special verdict finding that the officers were excused from complying with the knock-notice requirement of *California Penal Code* §844, that no excessive force was used in arresting Respondent, and that no battery occurred under State law. The jury also determined that respondent suffered neither actual nor nominal damages from Petitioners' warrantless entry into Respondent's residence. The trial court then entered judgment against Respondent on all the claims which had been allowed to go to the jury.[2]

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[2] At conclusion of Respondent's case, the trial court granted Petitioner's Motion for Directed Verdict on the pendant state claim of false arrest and false imprisonment. At the conclusion of the trial, the court dismissed Respondent's *Monell* claim against the City of Long Beach, which was bifurcated at the start of the trial.

Respondent appealed, contending among other things that Respondent was entitled to recover nominal damages as a matter of law for Petitioners' technical violation of Respondent's constitutional rights.

On July 31, 1992, the Ninth Circuit issued an opinion in which it vacated judgment in favor of Petitioner and held that Respondent was entitled to an award of one dollar in nominal damages on his Section 1983 claim. The court further ruled that Respondent, as "prevailing party," was entitled to attorney fees in an amount to be determined by the District Court.

Petitioners filed a timely petition for rehearing with the Ninth Circuit. In an order dated September 17, 1992, the Ninth Circuit denied the petition for rehearing, and filed an amended opinion, superseding the July 31, 1992 opinion. Appendix A, *infra*.

REASONS FOR GRANTING THE WRIT

This Court should review the holding of the Ninth Circuit awarding attorneys' fees to a plaintiff who received a jury verdict of zero actual or nominal damages for three reasons. First, the decision below is directly at odds with *Texas State Teachers*, *supra*, which requires a material alteration of the legal relationship between the parties to warrant a fee award. Second, the decision below is inconsistent with holdings of the Circuit Courts of Appeals for the Fourth, Fifth, Seventh, Eighth and Eleventh Circuits. Third, if the Ninth Circuit's opinion in this case is allowed to stand, an award of substantial attorneys fees, where the client receives a de minimis damage award, encourages a conflict of interest between attorney and client.

This Court should also review the holding of the Ninth Circuit finding nominal damages of one dollar to be mandatory upon the showing of a technical violation. The decision below is inconsistent with holdings of the Circuit Court of Appeals for the Fourth Circuit.

The issues presented are of paramount concern to law enforcement agencies and government entities as well as other civil rights litigants and is worthy of review by this Court.

I.

THIS COURT SHOULD REVIEW THE HOLDING OF THE NINTH CIRCUIT AWARDING ATTORNEY FEES IN FAVOR OF A PLAINTIFF WHO RECEIVED A JURY VERDICT OF ZERO ACTUAL OR NOMINAL DAMAGES AND ON APPEAL AN ORDER AWARDING ONE DOLLAR IN NOMINAL DAMAGES.

A. The Issue of Whether an Award of Nominal Damage of One Dollar in a Civil Rights Suit Entitles a Plaintiff to "Prevailing Party" Status Under 42 U.S.C. § 1988 is Currently Pending Before This Court in a Case in Which Certiorari Has Been Granted.

On February 24, 1992, this Court granted a writ of certiorari in the case of *Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991) *cert. granted sub nom. Farrar v. Hobby*, --- U.S. ---, 112 S. Ct. 1159, 117 L.Ed. 2d 407 (1992) (No. 91-990).[3] In *Farrar*, the Fifth Circuit held that a one dollar nominal judgment for a civil rights violation did not entitle the plaintiffs in the case to "prevailing party" status within the meaning of 42 U.S.C. Section 1988.

By granting the writ of certiorari in *Farrar*, this Court recognized the importance of the issue of entitlement to "prevailing party" status within the meaning of 42

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[3] This case was argued before this court on October 7, 1992.

U.S.C. Section 1988. This Court also recognized the difficulty the various Circuit Courts of Appeals have had in determining whether a party is a "prevailing party," a difficulty which has led to conflicting results in nearly identical cases.[4]

The question presented to this Court by the present case is similar but not identical to the question presented by *Farrar*. Is a party who recovers an award of zero actual or nominal damage in a civil rights suit a "prevailing party" within the meaning of 42 U.S.C. Section 1988 when the Appellate Court orders an award of one dollar in nominal damage? The fact that certiorari was granted in *Farrar* shows that the broad question of "prevailing party" status in civil rights litigation is an important one which has not yet been answered conclusively.

This writ for certiorari should be granted to consider the important ramifications of the "prevailing party" status issue presented by this petition. If, however, this Court should deem that the writ should not be granted at the present time, the Court should hold the petition for the writ until it decides the similar issue presented by *Farrar* and *Romberg*. The Court took similar action in *Keney v. New York*, 388 U.S. 440 (1967), where a petition for a writ of certiorari was held until decisions were rendered in similar cases.

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[4] Petition for Writ of Certiorari is currently pending before this court in another Ninth Circuit Court of Appeals case *Romberg v. Nichols* 970 F.2d 512 (9th Cir. 1992) *Petition for Certiorari filed* 9-3-92 (No. 92-402). The questions presented in *Romberg* are similar to those presented in *Farrar* and the present case.

B. The Courts of Appeals are in Direct Conflict over the Question of Whether a Plaintiff Who Receives an Award of Nominal Damages of One Dollar in a Civil Rights Suit is a "Prevailing Party" for the Purposes of 42 U.S.C. § 1988.

Generally speaking, a grant of certiorari is proper where federal courts of appeal are in square and irreconcilable conflict over an issue. *See*, *e.g.*, *McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted on an issue because of "a conflict among the Circuits on this issue of statutory construction"); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"). This is particularly true where the question raised is an important and recurring one. *See*, *e.g.*, *Shapiro v. United States*, 335 U.S. 1, 4 (1948) (certiorari granted "because this conflict involves an important question of statutory construction.")

The question of whether a civil rights plaintiff who receives a nominal damage award is a prevailing party under 42 U.S.C. Section 1988 and thus entitled to recover attorney's fees is an important and recurring one over which the Circuits are irreconcilably divided.

On the one hand, the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals are in agreement that a verdict of one dollar, or some other nominal relief, does not confer upon the plaintiff "prevailing party" within the meaning of 42 U.S.C. Section 1988, and this does not entitle the plaintiff to recover attorney's fees.

The Fourth Circuit, in *Denney v. Hinton*, 131 F.R.D. 659 (M.D.N.C. 1990), *aff'd mem.*, *Denny v. Elliot*, 937 F.2d 602, and *Lawrence v. Hinton*, 937 F.2d 603 (4th Cir. 1991), has held that a jury verdict in favor of the plaintiff for one dollar was de minimis and thus did not confer "prevailing party" status on the plaintiff.

The Fifth Circuit has held that a plaintiff who obtains a one dollar verdict is not a prevailing party and thus cannot recover attorney's fees. *Farrar v. Cain*, 941 F.2d 1311, 1315-1317 (5th Cir. 1991), *cert. granted sub nom. Farrar v. Hobby*, ____ U.S. ____,112 S. Ct. 1159, 117 L.Ed. 2d 407 (1992).

The Seventh Circuit, in *Northbrook Excess and Surplus Ins. v. Proctor & Gamble*, 924 F.2d 633, 641-2 n.11 (7th Cir. 1991), has held that a recovery of $45,500, in light of a claim of more than $5 million, was de minimis and thus did not confer "prevailing party" status on the plaintiff.

The Eight Circuit has also refused to grant "prevailing party" status to plaintiffs who obtain only nominal judgments. *Warren v. Fanning*, 950 F.2d 1370, 1375 (8th Cir. 1991) *petition for cert. filed* March 27, 1992 (No. 91-8221) (jury verdict finding that plaintiff's Eighth Amendment rights were violated was "pyrrhic victory" and thus de minimis under *Texas State Teachers*. Therefore, plaintiff was not prevailing party).

The Eleventh Circuit, in *Walker v. Anderson Electrical Connectors*, 944 F.2d 841, 847 (11th Cir. 1991), *petition for cert. filed* May 8, 1992 (No. 91-1794), has held that the mere fact that the jury found that the defendant committed acts of sexual harassment and thus violated Title VII did not entitle plaintiff to attorneys' fees as a "prevail-

ing party" under 42 U.S.C. Section 1988. Similarly, in *Carr v. City of Florence*, 729 F.Supp. 783, 791 (N.D. Ala. 1990), *aff'd* 934 F.2d 1264 (11th Cir. 1991), the District Court denied an award of attorney's fees to a plaintiff even though a jury found that police officers violated a citizen's rights by slapping him and awarded plaintiff $100 in compensatory damages. The Court reached this result because the judgment was still technical and de minimis.

However, despite these cases, the Second and the Ninth Circuits, and perhaps also the First Circuit, in which there are several inconsistent decisions, have held that even a one dollar nominal judgment entitles a plaintiff to recover attorney's fees as a "prevailing party" under 42 U.S.C. Section 1988.

The Second Circuit has held that even a one dollar award entitles a plaintiff to attorney's fees as the "prevailing party" under 42 U.S.C. Section 1988. *Fassett by and through Fassett v. Haeckel*, 936 F.2d 118, 122 (2d Cir. 1991) (fee award appropriate where nominal damages are recovered for violation of constitutional right); accord, *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991).

The Ninth Circuit, in the case of *Romberg v. Nichols*, 970 F.2d 512 (9th Cir. 1992) *Petition for Certiorari filed* 9-3-92 (No. 92-402) has held, in no uncertain terms, that even a one dollar judgment entitles the plaintiff to recover attorney's fees as a "prevailing party." The Court reached this result despite the fact that the plaintiff had sought damages in the amount of $2 million.

The First Circuit has also held that an award of one dollar entitles a plaintiff to recover attorney's fees as a "prevailing party" under 42 U.S.C. Section 1988. *Domegan v. Ponte*, 1992 WL 188811 (1st Cir. (Mass.). *But see*,

Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) (thousand dollar jury award for Fourth Amendment violation was technical and de minimis, and plaintiff's counsel acted improperly in requesting fees); and *Langton v. Johnston*, 928 F.2d 1206, 1226 (1st Cir. 1991) (if issue of "double bunking" was of only "minor significance," or did not have a "catalytic effect" in bringing about abandonment of the practice, no fees may be awarded under 42 U.S.C. Section 1988).

Based on the foregoing, it is clear that there is a serious conflict between the Circuits over whether a plaintiff who receives a one dollar judgment in a civil rights suit is a "prevailing party" for the purpose of recovering attorney's fees under 42 U.S.C. Section 1988.

On this basis, Petitioners request that the Court should grant the writ of certiorari in this case, or at least hold this petition until the Court has decided *Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991) *cert. granted sub nom. Farrar v. Hobby*, --- U.S. ---, 112 S.Ct. 1159, 117 L.Ed. 2d 407 (1992) (No. 91-990), a case which addresses the substantially similar issue, in order to clarify the serious conflict between the Circuits.

C. This Court Should Review George Because the Texas State Threshold is Not Met by an Award of Only One Dollar Against Law Enforcement Officers Who Acted in Good Faith.

In *Texas State Teachers*, this Court unanimously adopted the First Circuit's test for identifying whether a civil rights plaintiff is a prevailing party within the meaning of Section 1988: "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefits the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind."[5] To satisfy this inquiry, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."[6] Whether a material alteration of that legal relationship has occurred is the "touchstone" of the necessary inquiry.[7] Accordingly, this Court should consider whether George's recovery of one dollar in nominal damages constitutes a "material alteration" of plaintiff's "legal relationship" with the two officers. The *George* decision simply assumes that an award of one dollar materially alters the legal relationship between George and Petitioners.

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[5] 489 U.S. 782, 791-92 (1989) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

[6] *Id.* at 792 (citing *Hewitt v. Helms*, 482 U.S. 755, 762, 9 L.Ed.2d 654, 102 S.Ct. 2672 (1987), and *Rhodes v. Stewart*, 488 U.S. 1, 3-4, 102 L.Ed.2d 1, 109 S.Ct. 202 (1988)).

[7] *Id.* at 792-93.

The Ninth Circuit has apparently ruled that there can never be a de minimis victory as defined by the Supreme Court in *Texas State Teachers* in cases involving violations of the Fourth Amendment, since a lesser victory than that obtained by *George* is virtually impossible. The vindication obtained by *George* does not appear to have resulted in any highly significant benefit to *George* or society in general. In fact, any vindication obtained in *George* is identical to any relief or benefit obtained in Respondent's criminal case *United States v. George* 883 F.2d 1407 (9th Cir 1989), where the Ninth Circuit Court of Appeals found that Respondent's Fourth Amendment rights had been violated, but still affirmed respondent's conviction.

- If no benefit inured either to *George* nor to society at large, how can there be a material alteration in the legal relationship between the parties? The award of one dollar did not force the municipal entity of the City of Long Beach to take any steps after this incident in terms of advising its officers how to effectuate searches and seizures. The determination in no way has a deterrent effect on the conduct of any of these officers in the future.

If the Ninth Circuit Court of Appeal's Opinion in this case is allowed to stand, civil rights plaintiffs' counsel will be encouraged to pursue non-meritorious cases. Furthermore, an award of substantial attorneys fees, where the client receives a de minimis damage award of one dollar, presents a potential conflict of interest. Plaintiffs' counsel will be encouraged to pursue such cases solely for their own monetary benefit and possibly to the detriment of their clients interests. This Court can discourage such action by reviewing the decision in *George*.

II.

THIS COURT SHOULD REVIEW THE HOLDING OF THE NINTH CIRCUIT FINDING AN AWARD OF ONE DOLLAR NOMINAL DAMAGES MANDATORY IF A PLAINTIFF PROVES A TECHNICAL VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

A. The Courts of Appeals are in Direct Conflict Over the Question of Whether an Award of One Dollar Nominal Damages is Mandatory if a Plaintiff Proves a Technical Violation of His Constitutional Rights.

As set forth previously, a grant of certiorari is proper where federal courts of appeal are in square and irreconcilable conflict over an issue. *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted on an issue because of "a conflict among the Circuits on this issue of statutory construction"); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"). This is particularly true where the question raised is an important and recurring one. *See, e.g., Shapiro v. United States*, 335 U.S. 1,4 (1948) (certiorari granted "because this conflict involves an important question of statutory construction").

The Fourth Circuit, in *Ganey v. Edwards* 759 F.2d 337 (4th Cir. 1985), has held that an award of nominal damages is permissive, and a jury may decide to award a zero sum when a plaintiff proves a technical violation of his constitutional rights.

The Ninth Circuit in *Floyd v. Laws* 929 F.2d 1390 (9th Cir. 1991) and the present case of *George v. City of Long Beach*, has held that a one dollar nominal damage award is mandatory if a plaintiff proves a technical violation of his constitutional rights, and it is an abuse of discretion for a trial court to refuse to award such a plaintiff one dollar in nominal damages.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 8, 1992

APPENDICES

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Larry Donnell George,
Plaintiff-Appellant,
v.
City of Long Beach; Robert Fowks; Harry Kartinen,
Defendants-Appellees.

Nos. 91-55082
91-55382

D.C. No.
CV-87-2252-GHK

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, Magistrate Judge, Presiding

Argued and Submitted
February 4, 1992 Pasadena, California

Filed July 31, 1992

Before: Melvin Brunetti, Diarmuid F. O'Scannlain, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

SUMMARY

Individual Rights/Constitutional Rights/Civil Rights/Civil Litigation and Procedure/Torts/Evidence/Juries

Affirming in part, reversing in part and remanding a district court judgment, the court of appeals held that appellant was entitled to nominal damages under Section 1983 for the violation of his fourth amendment rights for the warrantless entry into his home by arresting officers.

Appellant Larry Donnell George was convicted of three armed bank robberies. He brought a Section 1983 action against the City of Long Beach and certain police officers, claiming damages for an allegedly warrantless entry into his apartment by police officers to arrest him. Although the district court granted George partial summary judgment, ruling that the officers' warrantless entry into George's apartment violated his fourth amendment rights, a jury ruled against George on all his other § 1983 issues and dismissed that claim. A jury instruction requested by George on nominal damages was refused by the district court. At the conclusion of the case, the district court also dismissed the state law claims for false arrest and imprisonment, on the basis that for there to have been an unlawful arrest to support these claims, there had to be a lack of probable cause.

[1] The court agreed with George that the district court's jury instruction that, if it found no actual damages flowing from the violation of George's rights, it could award nominal damages, misstated the law. [2] Under *Floyd,* nominal damages must be awarded as a symbolic vindication of the plaintiff's constitutional right whether or not the constitutional violation causes any actual damage.

Thus, in light of the trial court's finding that the officer's warrantless entry of George's house violated the fourth amendment, George was entitled to judgment and $1 in nominal damages on his § 1983 claim. [3] However, the court was not persuaded that the incorrect nominal damages instruction led the jury improperly to deny him compensatory damages. The jury was adequately instructed on the elements of George's claims and found that his injuries were not caused by the illegal entry. That conclusion would not have been altered by knowledge that George was entitled to nominal damages whether or not the constitutional violation caused him any harm. [4] Although the court held that George was entitled to nominal damages, it would not disturb the jury's finding of no actual damages. [5] Sufficient evidence supported the finding that George's actions inside the apartment were the cause of his injury. [6] In addition, the facts involving George's criminal activity preceding the unlawful arrest and his injuries were relevant and could not be presumed to have created an atmosphere of passion and prejudice against George. [7] Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest that resulted in nominal damages. George's recovery, if any, based upon such a claim would be limited to nominal damages. [8] However, the district court should have presented the state law claims of false arrest and false imprisonment to the jury. Thus, dismissal of the state law claims was reversed and the matter remanded.

COUNSEL

Ralph Rogari, Law Offices of Fred L. Wright, Torrance, California, for the plaintiff-appellant..

Harold W. Potter, Deputy City Attorney, Long Beach, California, for the defendants-appellees.

ORDER

The opinion filed on July 31, 1992, is amended as follows: on slip opinion page 9168, last line, replace "the prosecutor" with "counsel for the City"; and on slip opinion page 91770, line 4, replace "there was no prosecutorial misconduct" with "that the City did not overstep permissible bounds in its argument to the jury."

OPINION

T.G. NELSON, Circuit Judge:

Larry George ("George") appeals an adverse judgment following a jury verdict of zero damages against the arresting officers and the City of Long Beach. George contends the district court's ruling that the officers' warrantless entry violated his Fourth Amendment rights entitles him to nominal damages. He also contends the district court improperly dismissed his state law claims as well as his section 1983 claims against the City of Long Beach. We reverse the district court's dismissal of the state law claims, vacate the judgment, and remand for: (1) entry of judgment for George, (2) entry of an award of $1 in nominal damages on his section 1983 claim, and (3) trial on the state law false imprisonment claim.

FACTS AND PROCEEDINGS BELOW

Appellant Larry George participated in at least three armed bank robberies, two of which occurred on the afternoon of the day of his arrest. He was convicted of all three robberies and his convictions were upheld by this

court.[1] This civil rights action under 42 U.S.C. § 1983 resulted from the manner in which the arrest was effected. The facts surrounding George's arrest are set out in detail in *George I*. It is sufficient to say here that Long Beach police officers, assisted by a federal agent, had probable cause to believe that George was the robber and that he was in his apartment. *George I*, 883 F.2d at 1412. The city officers entered his apartment without a warrant, and without knocking. They saw George in his bedroom and told him to "hold it." When George moved, however, one of the officers, believing George to be holding a gun, fired a shotgun, striking George in the arm. The arm was ultimately amputated.

In *George I*, this court held that the warrantless arrest "was not excused by exigent circumstances and consequently was effected unlawfully." *Id.* at 1415. The district court here granted George's motion for partial summary judgment on that issue, and held that the officers were not entitled to qualified immunity as to the warrantless arrest.

The case went to trial on the issues of (1) whether the officers were excused from compliance with California's knock-notice statute (Cal. Penal Code § 844), (2) whether they used excessive force in arresting George, (3) whether the officers were liable for false arrest and false imprisonment, (4) whether the officer who fired the shot was liable for battery, (5) whether the officers acted wantonly, oppressively, or with malice, and (6) the amount of damages suffered by George as a result of the unlawful

---

[1] *United States v. George*, 883 F.2d 1407 (9th Cir. 1989) (*George I*).

warrantless entry. The jury ruled against George on all issues and found no damages by reason of the warrantless entry.

George requested a jury instruction on nominal damages which was refused by the district court. At the conclusion of George's case, the district court dismissed the state law claims for false arrest and imprisonment, on the basis that in order for there to have been an unlawful arrest to support these claims, there must have been a lack of probable cause for the arrest. Since there was probable cause here, the court apparently reasoned that the officers were immune from liability. The district court had previously severed the *Monell*[2] claim against the City and dismissed that claim when the verdict was returned. The district court entered judgment against George on all of the claims that had been allowed to go to the jury.

DISCUSSION

I. NOMINAL DAMAGES

[1] The district court instructed the jury that, if it found no actual damages flowing from the violation of George's rights, it could award nominal damages. George correctly points out that this instruction misstated the law. In this Circuit, nominal damages must be awarded if a plaintiff proves a violation of his constitutional rights. *Floyd v. Laws*, 929 F.2d 1390, 1401 (9th Cir. 1991); *Romberg v. Nichols*, 953 F.2d 1152, 1161, (9th Cir. 1992) (per curiam).

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[2]A municipality is liable for damages under 42 U.S.C. § 1983 when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

[2] The appellees ("City") attempt to distinguish *Floyd*, arguing that the violation of rights in *Floyd* was the proximate cause of the plaintiff's harm, whereas here the concededly illegal warrantless entry did not cause George any harm. We find this attempted distinction nonsensical. *Floyd* clearly held that nominal damages must be awarded "as a symbolic vindication of [the plaintiff's] constitutional right" whether or not the constitutional violation causes any actual damage. *Floyd*, 929 F.2d at 1403. In light of the court's finding that the officer's warrantless entry of George's house violated the Fourth Amendment, George was entitled to judgment and $1 in nominal damages on his section 1983 claim. We therefore vacate the judgment in favor of the defendants on this claim, and remand for entry of judgment and an award of nominal damages for George.

[3] George argues that the incorrect nominal damages instruction led the jury improperly to deny him compensatory damages. Jury instructions are reviewed for an abuse of discretion to determine if they are misleading or inadequate. *United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989). We are not persuaded that the instructions were misleading or inadequate. The jury was adequately instructed[3] on the elements of George's claims, and found that his injuries were not caused by the illegal entry. That conclusion would not have been altered by knowledge that George was entitled to a $1 award whether or not the constitutional violation caused him any harm.

---

[3]The court instructed the jury as to George's burden of proof and stated that the defendants' entry into George's home was unreasonable under the United States Constitution and no exigent circumstances existed.

II. THE JURY FINDING OF NO ACTUAL DAMAGE

[4] George contends that the jury's finding of no actual damages was based on insufficient evidence and was also the result of passion and jury prejudice because George's past criminal behavior was brought before the jury by the counsel for the City. Although we hold George is entitled to nominal damages, we will not disturb the jury's finding of no actual damages.

A. *Insufficient Evidence.*

George argues that the jury's finding of no actual damages is not supported by the evidence. The standard of review for a jury verdict in a civil case is whether it is supported by substantial evidence. *Landes Const. Co., Inc. v. Royal Bank of Canada,* 833 F.2d 1365, 1370-71 (9th Cir. 1987). "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* at 1371. Neither the district court nor the appellate court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. *Id.; Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). Questions of proximate causation are issues of fact which are properly left to the jury if reasonable persons could reach different conclusions. *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990).

In the final argument, the defense attorney asked the jury to review the evidence and find no damages because the injury inflicted upon George was due to his own actions inside the house. George's attorney asked the jury to award damages based on the warrantless entry (already established

as a matter of law), and argued that as a result of that entry, George was injured. Although there was evidence to support a conclusion that George would be entitled to damages, there was also evidence in the record to support the jury's verdict of no damages. This court cannot reweigh the evidence, and must affirm a decision based upon substantial evidence.

[5] The jury considered the evidence and arguments of the parties regarding George's right to damages. The record contains substantial evidence which supports the finding that George's actions inside the apartment were the cause of his injury. The jury's finding will thus be upheld.

B. *Passion and Prejudice.*

[6] George, while admitting that the City did not overstep permissible bounds in its argument to the jury and claiming no evidentiary error, asserts that the jury's verdict was based upon the jury's passion and prejudice because of George's past criminal behavior. George does not demonstrate how the record supports his claim. The facts involving George's criminal activity that preceded the unlawful arrest and his injuries were relevant and cannot be presumed to have created an atmosphere of passion and prejudice against George. We have held that there was substantial evidence in the record to support the jury verdict of no actual damages, thereby answering this argument.

III. *MONELL* CLAIM

After the verdict, the district court found that because the plaintiff sustained no actual damages as a result of the unconstitutional warrantless entry, logically there could be no damages flowing from the City's alleged failure

to adequately train its offices. The district court therefore dismissed George's *Monell* claim.

[7] Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if George were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of George's injuries. George's recovery, if any, based upon a *Monell* claim would be limited to nominal damages. We therefore hold that any error by the district court in dismissing the *Monell* claim was harmless.

IV. STATE LAW CLAIMS

[8] The district court should have presented the state law claims of false arrest and false imprisonment to the jury. The magistrate judge considered California Penal Code §§ 847 and 836[4] in granting the directed verdict. He found that those sections relieved the peace officers of liability so long as probable cause for the arrest had been established. The judge held that the false arrest must stem from a lack of reasonable and probable cause for the arrest.

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[4] California Penal Code section 836(3) states that a peace officer may make an arrest without a warrant when he or she has a reasonable cause to believe that the person to be arrested has committed a felony.

California Penal Code section 847 provides in relevant part: There shall be no civil liability on the part of and no cause of action shall arise against any peace officer, acting within the scope of his authority, for false arrest or false imprisonment arising out of any arrest when . . . [s]uch arrest was lawful or when such peace officer at the time of such arrest had reasonable cause to believe such arrest was lawful.

Since probable cause existed here, the judge concluded there was no false arrest.

The standard for reviewing the district court's grant of a directed verdict is the same as the review of a grant of judgment notwithstanding the verdict. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *see The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988). This court's role is the same as the district court's. *Jeanery*, 849 F.2d at 1151. We therefore review the evidence, considering it in the light most favorable to the non-moving party, to determine if there is substantial evidence to support a verdict for the non-moving party. If so, we must reverse. *Peterson*, 771 F.2d at 1256.

In California, false arrest and false imprisonment are not separate torts. "False arrest is but one way of committing a false imprisonment." *Collins v. San Francisco*, 123 Cal Rptr. 525, 526 (Cal. App. 1975). False imprisonment is "the non-consensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." *Molko v. Holy Spirit Ass'n for Unification of World Christianity*, 762 P.2d 46, 63 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989), quoting *City of Newport Beach v. Sasse*, 88 Cal. Rptr. 476, 480 (1970).

Penal Code § 847(a) protects police officers from civil liability for false arrest or imprisonment arising out of an arrest if the arrest is lawful or the officer had reasonable cause to believe it was lawful. The existence of probable cause is necessary but not by itself sufficient to establish an arrest's lawfulness. Even if probable cause is established, a warrantless arrest in the suspect's home is unlawful under both federal and state law in the absence of exigent circum-

stances. *George I,* 883 F.2d at 1415; *People v. Ramey,* 545 P.2d 1333, 1340-41 (Cal.), *cert. denied,* 429 U.S. 929 (1976). This court has already held that exigent circumstances were lacking and consequently the arrest was unlawful. *George I,* 883 F.2d at 1415. The district court held that no reasonable officer could have thought the warrantless entry to arrest George was lawful, and the City has not challenged that decision. As a matter of law, therefore, the immunity of section 847 was unavailable to the defendants and it was error to grant their motion for directed verdict.

The jury's findings that George suffered no damages "as a proximate result of [defendants'] warrantless entry into his home," and that the defendants did not use excessive force or commit a battery in making the arrest do not necessarily foreclose an award of damages for George's loss of liberty during or after his arrest. We therefore reverse the dismissal of the state law claims and remand for further proceedings.

George requested attorney fees in connection with this appeal. George, as the prevailing party on significant issues on this appeal, is entitled to attorney fees for this appeal. *See Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989); *Romberg,* 953 F.2d at 1157. The district court shall set the amount of attorney fees on remand.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Larry Donnell George, *Plaintiff-Appellant,* v. City of Long Beach; Robert Fowks; Harry Kartinen, *Defendants-Appellees.*	Nos. 91-55082 91-55382 D.C. No. CV-87-2252-GHK OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, Magistrate Judge, Presiding

Argued and Submitted
February 4, 1992 Pasadena, California

Filed July 31, 1992

Before: Melvin Brunetti, Diarmuid F. O'Scannlain, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

SUMMARY

Individual Rights/Constitutional Rights/Civil Rights/Civil Litigation and Procedure/Torts/Evidence/Juries

Affirming in part, reversing in part and remanding a district court judgment, the court of appeals held that appellant was entitled to nominal damages under Section 1983 for the violation of his fourth amendment rights for the warrantless entry into his home by arresting officers.

Appellant Larry Donnell George was convicted of three armed bank robberies. He brought a Section 1983 action against the City of Long Beach and certain police officers, claiming damages for an allegedly warrantless entry into his apartment by police officers to arrest him. Although the district court granted George partial summary judgment, ruling that the officers' warrantless entry into George's apartment violated his fourth amendment rights, a jury ruled against George on all his other § 1983 issues and dismissed that claim. A jury instruction requested by George on nominal damages was refused by the district court. At the conclusion of the case, the district court also dismissed the state law claims for false arrest and imprisonment, on the basis that for there to have been an unlawful arrest to support these claims, there had to be a lack of probable cause.

[1] The court agreed with George that the district court's jury instruction that, if it found no actual damages flowing from the violation of George's rights, it could award nominal damages, misstated the law. [2] Under *Floyd,* nominal damages must be awarded as a symbolic vindication of the plaintiff's constitutional right whether or not the constitutional violation causes any actual damage.

Thus, in light of the trial court's finding that the officer's warrantless entry of George's house violated the fourth amendment, George was entitled to judgment and $1 in nominal damages on his § 1983 claim. [3] However, the court was not persuaded that the incorrect nominal damages instruction led the jury improperly to deny him compensatory damages. The jury was adequately instructed on the elements of George's claims and found that his injuries were not caused by the illegal entry. That conclusion would not have been altered by knowledge that George was entitled to nominal damages whether or not the constitutional violation caused him any harm. [4] Although the court held that George was entitled to nominal damages, it would not disturb the jury's finding of no actual damages. [5] Sufficient evidence supported the finding that George's actions inside the apartment were the cause of his injury. [6] In addition, the facts involving George's criminal activity preceding the unlawful arrest and his injuries were relevant and could not be presumed to have created an atmosphere of passion and prejudice against George. [7] Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest that resulted in nominal damages. George's recovery, if any, based upon such a claim would be limited to nominal damages. [8] However, the district court should have presented the state law claims of false arrest and false imprisonment to the jury. Thus, dismissal of the state law claims was reversed and the matter remanded.

COUNSEL

Ralph Rogari, Law Offices of Fred L. Wright, Torrance, California, for the plaintiff-appellant.

Harold W. Potter, Deputy City Attorney, Long Beach, California, for the defendants-appellees.

OPINION

T.G. NELSON, Circuit Judge:

Larry George ("George") appeals an adverse judgment following a jury verdict of zero damages against the arresting officers and the City of Long Beach. George contends the district court's ruling that the officers' warrantless entry violated his Fourth Amendment rights entitles him to nominal damages. He also contends the district court improperly dismissed his state law claims as well as his section 1983 claims against the City of Long Beach. We reverse the district court's dismissal of the state law claims, vacate the judgment, and remand for: (1) entry of judgment for George, (2) entry of an award of $1 in nominal damages on his section 1983 claim, and (3) trial on the state law false imprisonment claim.

FACTS AND PROCEEDINGS BELOW

Appellant Larry George participated in at least three armed bank robberies, two of which occurred on the afternoon of the day of his arrest. He was convicted of all three robberies and his convictions were upheld by this court.[1] This civil rights action under 42 U.S.C. § 1983 resulted from the manner in which the arrest was effected. The facts surrounding George's arrest are set out in detail in *George I*. It is sufficient to say here that Long Beach police officers, assisted by a federal agent, had probable

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[1] *United States v. George*, 883 F.2d 1407 (9th Cir. 1989) (*George I*).

cause to believe that George was the robber and that he was in his apartment. *George I*, 883 F.2d at 1412. The city officers entered his apartment without a warrant, and without knocking. They saw George in his bedroom and told him to "hold it." When George moved, however, one of the officers, believing George to be holding a gun, fired a shotgun, striking George in the arm. The arm was ultimately amputated.

In *George I*, this court held that the warrantless arrest "was not excused by exigent circumstances and consequently was effected unlawfully." *Id.* at 1415. The district court here granted George's motion for partial summary judgment on that issue, and held that the officers were not entitled to qualified immunity as to the warrantless arrest.

The case went to trial on the issues of (1) whether the officers were excused from compliance with California's knock-notice statute (Cal. Penal Code § 844), (2) whether they used excessive force in arresting George, (3) whether the officers were liable for false arrest and false imprisonment, (4) whether the officer who fired the shot was liable for battery, (5) whether the officers acted wantonly, oppressively, or with malice, and (6) the amount of damages suffered by George as a result of the unlawful warrantless entry. The jury ruled against George on all issues and found no damages by reason of the warrantless entry.

George requested a jury instruction on nominal damages which was refused by the district court. At the conclusion of George's case, the district court dismissed the state law claims for false arrest and imprisonment, on the basis that in order for there to have been an unlawful arrest

to support these claims, there must have been a lack of probable cause for the arrest. Since there was probable cause here, the court apparently reasoned that the officers were immune from liability. The district court had previously severed the *Monell*[2] claim against the City and dismissed that claim when the verdict was returned. The district court entered judgment against George on all of the claims that had been allowed to go to the jury.

DISCUSSION

I. NOMINAL DAMAGES

[1] The district court instructed the jury that, if it found no actual damages flowing from the violation of George's rights, it could award nominal damages. George correctly points out that this instruction misstated the law. In this Circuit, nominal damages must be awarded if a plaintiff proves a violation of his constitutional rights. *Floyd v. Laws*, 929 F.2d 1390, 1401 (9th Cir. 1991); *Romberg v. Nichols*, 953 F.2d 1152, 1161, (9th Cir. 1992) (per curiam).

[2] The appellees ("City") attempt to distinguish *Floyd*, arguing that the violation of rights in *Floyd* was the proximate cause of the plaintiff's harm, whereas here the concededly illegal warrantless entry did not cause George any harm. We find this attempted distinction nonsensical. *Floyd* clearly held that nominal damages must be awarded "as a symbolic vindication of [the plaintiff's] constitutional right" whether or not the constitutional violation causes any

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[2] A municipality is liable for damages under 42 U.S.C. § 1983 when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

actual damage. *Floyd*, 929 F.2d at 1403. In light of the court's finding that the officer's warrantless entry of George's house violated the Fourth Amendment, George was entitled to judgment and $1 in nominal damages on his section 1983 claim. We therefore vacate the judgment in favor of the defendants on this claim, and remand for entry of judgment and an award of nominal damages for George.

[3] George argues that the incorrect nominal damages instruction led the jury improperly to deny him compensatory damages. Jury instructions are reviewed for an abuse of discretion to determine if they are misleading or inadequate. *United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989). We are not persuaded that the instructions were misleading or inadequate. The jury was adequately instructed[3] on the elements of George's claims, and found that his injuries were not caused by the illegal entry. That conclusion would not have been altered by knowledge that George was entitled to a $1 award whether or not the constitutional violation caused him any harm.

II. THE JURY FINDING OF NO ACTUAL DAMAGE

[4] George contends that the jury's finding of no actual damages was based on insufficient evidence and was also the result of passion and jury prejudice because George's past criminal behavior was brought before the jury by the prosecutor. Although we hold George is entitled to nominal damages, we will not disturb the jury's finding of no actual damages.

---

[3] The court instructed the jury as to George's burden of proof and stated that the defendants' entry into George's home was unreasonable under the United States Constitution and no exigent circumstances existed.

A. *Insufficient Evidence.*

George argues that the jury's finding of no actual damages is not supported by the evidence. The standard of review for a jury verdict in a civil case is whether it is supported by substantial evidence. *Landes Const. Co., Inc. v. Royal Bank of Canada,* 833 F.2d 1365, 1370-71 (9th Cir. 1987). "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* at 1371. Neither the district court nor the appellate court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. *Id.; Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). Questions of proximate causation are issues of fact which are properly left to the jury if reasonable persons could reach different conclusions. *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990).

In the final argument, the defense attorney asked the jury to review the evidence and find no damages because the injury inflicted upon George was due to his own actions inside the house. George's attorney asked the jury to award damages based on the warrantless entry (already established as a matter of law), and argued that as a result of that entry, George was injured. Although there was evidence to support a conclusion that George would be entitled to damages, there was also evidence in the record to support the jury's verdict of no damages. This court cannot reweigh the evidence, and must affirm a decision based upon substantial evidence.

[5] The jury considered the evidence and arguments of the parties regarding George's right to damages. The record contains substantial evidence which supports the finding that George's actions inside the apartment were the cause of his injury. The jury's finding will thus be upheld.

B. *Passion and Prejudice.*

[6] George, while admitting there was no prosecutorial misconduct and claiming no evidentiary error, asserts that the jury's verdict was based upon the jury's passion and prejudice because of George's past criminal behavior. George does not demonstrate how the record supports his claim. The facts involving George's criminal activity that preceded the unlawful arrest and his injuries were relevant and cannot be presumed to have created an atmosphere of passion and prejudice against George. We have held that there was substantial evidence in the record to support the jury verdict of no actual damages, thereby answering this argument.

III. *MONELL* CLAIM

After the verdict, the district court found that because the plaintiff sustained no actual damages as a result of the unconstitutional warrantless entry, logically there could be no damages flowing from the City's alleged failure to adequately train its offices. The district court therefore dismissed George's *Monell* claim.

[7] Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if George were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already

determined was not the proximate cause of George's injuries. George's recovery, if any, based upon a *Monell* claim would be limited to nominal damages. We therefore hold that any error by the district court in dismissing the *Monell* claim was harmless.

IV. STATE LAW CLAIMS

[8] The district court should have presented the state law claims of false arrest and false imprisonment to the jury. The magistrate judge considered California Penal Code §§ 847 and 836[4] in granting the directed verdict. He found that those sections relieved the peace officers of liability so long as probable cause for the arrest had been established. The judge held that the false arrest must stem from a lack of reasonable and probable cause for the arrest. Since probable cause existed here, the judge concluded there was no false arrest.

The standard for reviewing the district court's grant of a directed verdict is the same as the review of a grant of judgment notwithstanding the verdict. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *see The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988). This court's role is the same as the district court's. *Jeanery*, 849 F.2d at 1151. We therefore review the evidence, considering it

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[4] California Penal Code section 836(3) states that a peace officer may make an arrest without a warrant when he or she has a reasonable cause to believe that the person to be arrested has committed a felony.

California Penal Code section 847 provides in relevant part: There shall be no civil liability on the part of and no cause of action shall arise against any peace officer, acting within the scope of his authority, for false arrest or false imprisonment arising out of any arrest when . . . [s]uch arrest was lawful or when such peace officer at the time of such arrest had reasonable cause to believe such arrest was lawful.

in the light most favorable to the non-moving party, to determine if there is substantial evidence to support a verdict for the non-moving party. If so, we must reverse. *Peterson*, 771 F.2d at 1256.

In California, false arrest and false imprisonment are not separate torts. "False arrest is but one way of committing a false imprisonment." *Collins v. San Francisco*, 123 Cal Rptr. 525, 526 (Cal. App. 1975). False imprisonment is "the non-consensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." *Molko v. Holy Spirit Ass'n for Unification of World Christianity*, 762 P.2d 46, 63 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989), quoting *City of Newport Beach v. Sasse*, 88 Cal. Rptr. 476, 480 (1970).

Penal Code § 847(a) protects police officers from civil liability for false arrest or imprisonment arising out of an arrest if the arrest is lawful or the officer had reasonable cause to believe it was lawful. The existence of probable cause is necessary but not by itself sufficient to establish an arrest's lawfulness. Even if probable cause is established, a warrantless arrest in the suspect's home is unlawful under both federal and state law in the absence of exigent circumstances. *George I*, 883 F.2d at 1415; *People v. Ramey*, 545 P.2d 1333, 1340-41 (Cal.), *cert. denied*, 429 U.S. 929 (1976). This court has already held that exigent circumstances were lacking and consequently the arrest was unlawful. *George I*, 883 F.2d at 1415. The district court held that no reasonable officer could have thought the warrantless entry to arrest George was lawful, and the City has not challenged that decision. As a matter of law, therefore, the immunity of section 847 was unavailable to

the defendants and it was error to grant their motion for directed verdict.

The jury's findings that George suffered no damages "as a proximate result of [defendants'] warrantless entry into his home," and that the defendants did not use excessive force or commit a battery in making the arrest do not necessarily foreclose an award of damages for George's loss of liberty during or after his arrest. We therefore reverse the dismissal of the state law claims and remand for further proceedings.

George requested attorney fees in connection with this appeal. George, as the prevailing party on significant issues on this appeal, is entitled to attorney fees for this appeal. *See Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989); *Romberg*, 953 F.2d at 1157. The district court shall set the amount of attorney fees on remand.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX C

FILED
SEP 11 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
SEP 12 1990
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LARRY D. GEORGE,
Plaintiff,

vs.

CITY OF LONG BEACH, et al.,
Defendants.

NO. CV87-2252-GHK

ORDER DIRECTING ENTRY OF JUDGMENT

On September 11, 1990, the jury returned its special verdict in the above-entitled case. We ordered the special verdict filed, and now order entry of judgment as follow:

I. Individual Defendants

Pursuant to the jury's findings on the special verdict form, judgment shall be rendered in favor of defendants Harry Kartinen and Robert Fowks and against plaintiff Larry D. George on all claims.

II. City of Long Beach on the State Claim

Pursuant to the jury's findings on the special verdict form, judgment shall be rendered in favor of defendant City of Long Beach and against plaintiff Larry D. George on the state law claims.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

III. Monell Claim against City of Long Beach

Pursuant to our order set forth on the record in open court, plaintiff's Monell claim against the City of Long Beach is dismissed. In addition to the grounds stated in open court, and as amplification thereon, we find that any proceeding against the City of Long Beach in light of the jury's findings would have been a futility, and a waste of judicial resources.

Although the court found prior to trial that the warrantless entry of plaintiff's residence was unreasonable under the Fourth Amendment, and that the officers were not entitled to qualified immunity, the jury found that plaintiff suffered no damages as a result of this constitutional violation.

Plaintiff admits that his only Monell theory in this case is based on City of Canton v. Harris, __ U.S. __, 109 S.Ct. 1197 (1989), in that the City of Long Beach's alleged failure to train the officers on Fourth Amendment matters amounted to a deliberate indifference to the constitutional rights of persons with whom the police come into contact. Id. at 1204.

However, given the jury's finding that plaintiff sustained no damages as a result of the unconstitutional warrantless entry, logically there can be no damages flowing from the City's alleged failure to adequately train. While the alleged inadequate training may be a source of municipal liability based on the City's own actions, the resulting constitutional violation of the warrantless entry is the same violation which the officers committed.

Since the jury already found that the officers' constitutional violation of the warrantless entry produced no damages, it is a foregone conclusion that there can be no damages against the City even if plaintiff were otherwise able to prove the predicates for Monell liability. For that one and the same constitutional violation, there cannot be any damages as against the City when there is none as against the individual officers.

Because it would have been a futility to try the Monell claim under the facts and circumstances here, we grant dismissal of plaintiff's Monell claim as against the City of Long Beach.

IT IS SO ORDERED.

Dated: This 11th day of September, 1990

GEORGE H. KING
United States Magistrate

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: _____

_____
DEPUTY CLERK

BEST AVAILABLE COPY

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State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on December 8, 1992, I served the within *Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and Forty Copies*)

Clerk, United States Court of Appeals
Ninth Judicial Circuit
121 Spear Street
San Francisco, CA 94119-3939

Law Offices of Fred L. Wright
Ralph Rogari
1515 Crenshaw Boulevard
Torrance, California 90501

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 8, 1992, at Los Angeles, California.

Betty J. Malloy
(*Original Signed*)